FILE COPY

No. 996

IN THE

Supreme Court of the United States

October Term, 1959

O. B. ELLIS, DIRECTOR
TEXAS BOARD OF CORRECTIONS,
Petitioner,

v.

EDWARD MORGAN MACKENNA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

WILL WILSON
Attorney General of Texas

LINWARD SHIVERS
Assistant Attorney General

JOHN FLOWERS
Assistant Attorney General

JACK N. PRICE
Assistant Attorney General
Capitol Station
Austin, Texas

Attorneys for Petitioner

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
Reasons for Granting the Writ	5
Conclusion	10
Affidavit of Service	11
Appendices: "A"—Rule 543, Texas Code of Criminal Procedure	12
"B"—Memorandum and Order, United States District Court for the Southern District of Texas	13
"C"—Opinion and Judgment of Fifth Circuit Court of Appeals	15
"D"—Opinion of Texas Court of Criminal Appeals in Moore v. State	43

CITATIONS

Cases:	Page
Adamson v. California, 332 U.S. 46 (1947)	5
Betts v. Brady, 316 U.S. 455 (1942)	5
Brown v. Allen, 344 U.S. 443 (1953)	6, 9
Gallegos v. Nebraska, 342 U.S. 55 (1951)	5
Gray v. Ellis, 257 F. 2d 195 (Fifth Cir. 1958)	7
Holton v. State, 158 S.W. 2d 772 (Tex. Cr. App. 1942)	8
Macomber v. Hudspeth, 115 F. 2d 114 (Tenth Cir. 1940, Cert. Den. 313 U.S. 558)	10
Moore v. State, (unreported; see Appendix "D")	8, 9
Price v. Johnston, 144 F. 2d 260 (Ninth Cir. 1944, Cert. Den. 323 U.S. 19)	10
United States v. Ragen, 166 F. 2d 976 (Seventh Cir. 1948)	7, 8
Wolf v. Colorado, 338 U.S. 25 (1949)	5

Statutes:	
Rule 543 (Appendix "A")	12
Section 2254, Title 28, U.S.C.A.	6

No. _____

IN THE

Supreme Court of the United States

October Term, 1959

O. B. ELLIS, DIRECTOR
TEXAS BOARD OF CORRECTIONS,
Petitioner,

v.

EDWARD MORGAN MACKENNA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Petitioner, O. B. Ellis, Director, Texas Board of Corrections, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on January 16, 1959.

Citations to Opinions Below

The memorandum opinion of the United States District Court for the Southern District of Texas (R.122) is unreported and is printed in Appendix "B" hereto, *infra*, p. 13. The opinion of the United States Court of Appeals, Fifth Circuit, (R.140)

printed in Appendix "C" hereto, is not yet officially reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on January 16, 1959 (R.166). Rehearing was denied on March 20, 1959 (R.190).

The jurisdiction of this Court is invoked under 28 U.S.C.A., Sec. 1254(1).

Questions Presented

1.

Was it a denial of due process for Criminal District Court No. 3, Dallas, Texas, to refuse to grant Respondent a continuance in a criminal prosecution for a non-capital felony because he failed to comply with the requirements prescribed by Art. 543 of the Texas Code of Criminal Procedure?

2.

Was it a denial of due process for Criminal District Court No. 3, Dallas, Texas, to appoint Counsel over the protest of Respondent in a criminal prosecution for a non-capital felony?

3.

Can the Fifth Circuit Court of Appeals reverse and remand a cause for hearing by the United States

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
Reasons for Granting the Writ	5
Conclusion	10
Affidavit of Service	11
Appendices: "A"—Rule 543, Texas Code of Criminal Procedure	12
"B"—Memorandum and Order, United States District Court for the Southern District of Texas	13
"C"—Opinion and Judgment of Fifth Circuit Court of Appeals	15
"D"—Opinion of Texas Court of Criminal Appeals in Moore v. State	43

CITATIONS

Cases:	Page
Adamson v. California, 332 U.S. 46 (1947)	5
Betts v. Brady, 316 U.S. 455 (1942)	5
Brown v. Allen, 344 U.S. 443 (1953)	6, 9
Gallegos v. Nebraska, 342 U.S. 55 (1951)	5
Gray v. Ellis, 257 F. 2d 195 (Fifth Cir. 1958)	7
Holton v. State, 158 S.W. 2d 772 (Tex. Cr. App. 1942)	8
Macomber v. Hudspeth, 115 F. 2d 114 (Tenth Cir. 1940, Cert. Den. 313 U.S. 558)	10
Moore v. State, (unreported; see Appendix "D")	8, 9
Price v. Johnston, 144 F. 2d 260 (Ninth Cir. 1944, Cert. Den. 323 U.S. 19)	10
United States v. Ragen, 166 F. 2d 976 (Seventh Cir. 1948)	7; 8
Wolf v. Colorado, 338 U.S. 25 (1949)	5

Statutes:	
Rule 543 (Appendix "A")	12
Section 2254, Title 28, U.S.C.A.	6

No.

IN THE

Supreme Court of the United States

October Term, 1959

O. B. ELLIS, DIRECTOR
TEXAS BOARD OF CORRECTIONS,
Petitioner,

v.

EDWARD MORGAN MACKENNA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Petitioner, O. B. Ellis, Director, Texas Board of Corrections, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on January 16, 1959.

Citations to Opinions Below

The memorandum opinion of the United States District Court for the Southern District of Texas (R.122) is unreported and is printed in Appendix "B" hereto, *infra*, p. 13. The opinion of the United States Court of Appeals, Fifth Circuit, (R.140)

printed in Appendix "C" hereto, is not yet offcially reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on January 16, 1959 (R.166). Rehearing was denied on March 20, 1959 (R.190).

The jurisdiction of this Court is invoked under 28 U.S.C.A., Sec. 1254(1).

Questions Presented

1.

Was it a denial of due process for Criminal District Court No. 3, Dallas, Texas, to refuse to grant Respondent a continuance in a criminal prosecution for a non-capital felony becouse he failed to comply with the requirements prescribed by Art. 543 of the Texas Code of Criminal Procedure?

2.

Was it a denial of due process for Criminal District Court No. 3, Dallas, Texas, to appoint Counsel over the protest of Respondent in a criminal prosecution for a non-capital felony?

3.

Can the Fifth Circuit Court of Appeals reverse and remand a cause for hearing by the United States

education and mental alertness to the point of being able to represent himself upon the trial.

Such holding is directly contrary to the presumption on appeal that the trial court's rulings and acts are correct and fair. It overlooks the fact that an accused has the constitutional right to be heard by himself; that he may waive representation by an attorney; that the accused must use diligence to secure counsel; and that even in capital cases the duty of the court to appoint counsel arises only when the court is apprised of the fact that the accused is too poor to employ counsel.

Appellant was advised of his rights with reference to application for suspended sentence and stated "I don't want to ask for suspended sentence."

The statutes of this State do not require that counsel be appointed to represent a defendant in a non-capital felony who states that he does not desire to file application for susupended sentence. The majority opinion overlooks the limitation in Art. 776 C. C. P. "if desired by defendant." It also overlooks the holdings of this Court that the attorney appointed pursuant to the requirements of Art. 776 C. C. P. is not under the duty to defend generally, but only to prepare and present the plea for suspension of sentence.

Any claim (and there is none) that appellant was too poor to employ counsel would be refuted by the fact that he did obtain counsel who filed his motion

for new trial, perfected his appeal and filed brief in his behalf in this Court.

It is deemed appropriate, also to direct attention to the fact that the reversal of the conviction is not founded upon the legal conclusion of a majority of the members of this Court that appellant has been denied his constitutional right to be represented by counsel, but upon the belief that an affirmance would be reversed by the Supreme Court of the United States upon appeal.

If this be the true function of judges, the law is indeed uncertain.

Whether by this Court or by the Supreme Court, a reversal of this conviction on a constitutional question, upon the record before us, would be without any pleading or proof to sustain the holding. The case cited would not support such a reversal.

I respectfully dissent.

Woodley, Judge.

(Delivered May 13, 1959)

District Court for the Southern District of Texas where the District Court has reviewed the entire record in the case and has found that the State process has given fair consideration to the issues and the evidence and has resulted in a satisfactory conclusion?

Statute Involved

The statutory provision involved is Article 543 of the Texas Code of Criminal Procedure. It is printed in Appendix "A", *infra*, pages 12-13.

Statement

On October 2, 1956, Respondent was convicted in Criminal District Court No. 3, Dallas, Texas, of theft of personal property over the value of $50.00, and was sentenced to eight years of confinement at hard labor in the Texas State Penitentiary.

Respondent, acting *pro se*, appealed the judgment of conviction to the Court of Criminal Appeals of Texas. On April 3, 1957, the Court of Criminal Appeals affirmed the judgment of the Criminal District Court. *MacKenna vs. Texas*, 301 S.W.2d 657 (R.56).

On October 14, 1957, Respondent's Petition for Writ of Certiorari to the Texas Court of Criminal Appeals was denied. 355 U. S. 851.

On July 31, 1957, Criminal District Court No. 3, Dallas Texas, denied, without hearing, an applica-

tion by Respondent for writ of habeas corpus. *MacKenna vs. Decker, Sheriff, Dallas County* (R.11).

On October 31, 1957, the Texas Court of Criminal Appeals denied, without hearing or opinion, Respondent's petition for writ of habeas corpus.

Subsequently, Respondent invoked the jurisdiction of the United States District Court for the Southern District of Texas by filing a petition for writ of habeas corpus.

On January 28, 1958, the United States District Court for the Southern District of Texas denied and dismissed Respondent's petition for writ of habeas corpus (R. 122). Petition for rehearing was also denied (R. 126), and the Court refused to issue a certificate of probable cause, or to grant leave to appeal in *forma pauperis* (R. 130).

On the 31st day of March, 1958, Respondent was granted a certificate of probable cause and the right to appeal in *forma pauperis* by the United States Court of Appeals for the Fifth Circuit.

The United States Court of Appeals for the Fifth Circuit reversed and remanded the cause to the United States District Court for the Southern District of Texas by opinion dated January 16, 1958, (R. 166; Appendix "C", *infra*, page 15). On March 20, 1959, Respondent O. B. Ellis' motion for re-hearing was denied (R.190).

REASONS FOR GRANTING THE WRIT

Question Number 1

1. The decision of the Court below is in conflict with the principle of law enuncitaed in *Betts v. Brady*, 316 U.S. 455 (1942), *Adamson v. California*, 332 U.S. 46 (1947), *Wolf v. Colorado*, 338 U.S. 25 (1949) and *Gallegos v. Nebraska*, 342 U.S. 55 (1951).

The foregoing cases held that a state may prescribe the rules of procedure to govern criminal prosecutions, and that the Fourteenth Amendment does not require the adoption of criminal procedure in use in Federal courts. In holding that the denial of a continuance because of failure to comply with Article 543, Texas Code of Criminal Procedure, may have denied Respondent due process, the Fifth Circuit Court of Appeals has circumscribed the right of the Legislature of Texas to establish and of Texas courts to follow the prescribed procedure in criminal cases. Under the interpretation of the Court below, it may be held that, even though state procedure conforms to the standard set forth in the cases cited above, a defendant has been denied due process when the state requirements for a motion for continuance do not conform to what a Federal Court thinks due process requires.

2. The Court below, by remanding this cause for hearing on a point which is within the sovereign sphere of the State of Texas and which has been decided adversely to Respondent by the highest court

of the State, is allowing the writ of habeas corpus to serve as a second appeal contrary to the rule established by *Brown v. Allen*, 344 U.S. 443 (1953). Such action opens the door to abuse of the writ of habeas corpus and is in clear contravention of the purpose of Sec. 2254, Title 28, U.S.C.A. (See dissenting opinion, Hutcheson, Chief Judge, Appendix "C", *infra*, page 37). Further, to remand the cause for hearing by the District Court, when that court has considered the claim for relief and dismissed it as without merit, conflicts with the principle established by this Court in *Brown v. Allen*, *supra*, wherein it is stated that "permitting a district court to dismiss an application for habeas corpus on the strength of the prior record should be a procedural development to reduce abuse of the right to repeated hearings", and "where the state action was based on an adequate state ground, no further examination is required unless no state remedy for deprivation of Federal constitutional rights ever existed."

3. The importance of this question cannot be gainsaid. It is a question which will be constantly recurring. To allow the decision of the Fifth Circuit Court of Appeals to stand will cast a doubt upon the status of procedure in criminal prosecutions in all states which prescribe the method and requirements for obtaining a continuance. The United States District Courts, whose dockets are already overcrowded, will be required to allot time for hearing to every spurious claim that, although no motion for continuance was made in proper form for consideration by the original trial court, the applicant was denied due process

by failure to grant a continuance. A flood of such claims will inevitably follow the decision of the Court below.

Question Number 2

1. The decision of the Court below on Point No. 2 is in direct conflict with *Gray v. Ellis*, 257 F.2d 159 (Fifth Cir., 1958), and with the principle enunciated by *United States v. Ragen*, 166 F. 2d 976 (Seventh Cir., 1948).

In *Gray v. Ellis*, the Fifth Circuit Court of Appeals held that the action of a trial court in appointing counsel and requiring him to remain with the Petitioner throughout the trail was not a denial of due process despite the fact that the Petitioner did not want the appointed counsel and attempted to discharge him. The Court stated:

> "We think that where a state court has so far conformed its conduct of a trial in a non-capital case to basic concepts of due process as to appoint able and experienced counsel and to urge accused to use his services (which is not denied by Petitioner here) and there is no express allegation that the accused complained to the Court of the particular alleged defects in such counsel's conduct of Petitioner's case as are now raised here, there has been no such *prima facie* showing of unfairness as would require a hearing under the Federal statutes."

The Court in *United States v. Ragen* stated that mistakes of counsel, although indicative of lack of skill or even incompetency, will not vitiate the trial

unless on the whole the representation is of such low caliber as to amount to no representation and to reduce the trial to a farce.

Respondent did not complain in the trial court of defects in representation by the appointed counsel. In fact, Respondent failed in his appeal and in his several applications for writ of habeas corpus to allege any specific defects which might possibly have prejudiced or injured him. From a review of the record it is obvious that if any defects in representation existed they were not of such nature as would have caused injury to Respondent, and certainly were not of such magnitude as to amount to no representation or to reduce the trial to a farce. Consequently, the Court below should have adhered to its prior decision in the *Gray* case and to the principle set forth in the *Ragen* case, and should have upheld the District Court's action in denying the Respondent's petition without hearing.

2. This question is of compelling importance for another reason. Until recently it has been the Texas view that the standards of due process required the appointment of counsel only in non-capital cases; in contested cases involving non-capital felonies appointment of counsel was left to the discretion of the trial court judge. See *Holton v. State*, 158 S.W.2d 772 (Tex. Cr. App. 1942, Cert.De... 316 U.S. 703). However, it was held in *Johnny Moore v. The State of Texas*, decided on May 13, 1959, that counsel is required in felony cases regardless of possible punishment. (The opinion in this case is contained in Ap-

pendix "D", *infra*, page 43, *et seq)*. The court so held despite the fact that the point was not raised by appellant. Under this set of circumstances, criminal judges in Texas are impaled on a two-horned dilemma, one horn being the *Moore* case, the other being the decision of the Court below; if an accused protests appointment of counsel, the Court will be in the position of denying due process whether it appoints counsel or fails to appoint counsel. It is imperative that this Court act to either overrule the decision of the Court below or to prescribe limitations on its holding so as to remove this anomalous situation.

3. It is repetitious to point out that the decision of the Court below will cause additional abuse of the writ of habeas corpus, but this factor is also an important consideration under Question No. 2.

Question Number 3

1. The decision of the United States Circuit Court for the Fifth Circuit directly conflicts with the principle established by *Brown v. Allen*, cited above, that a Federal District Court is not required to grant a hearing on a petition for writ of habeas corpus if it is satisfied upon review of the record that the State process has given fair consideration to the issues and the offered evidence and has resulted in a satisfactory conclusion.

2. The decision of the Court below is also in conflict with *Price v. Johnson*, 144 Fed.2d 260 (9th Cir., 1944, Cert.Den. 323 U.S. 19), *Macomber v. Hudspeth*, 115

F.2d 114 (10th Cir. 1940, Cert.Den. 313 U.S. 558) and others.

It is uniformly held that a judgment denying a writ of habeas corpus must be sustained on appeal where such finding was supported by substantial evidence and was not clearly wrong. The action of the Fifth Circuit Court of Appeals in reversing and remanding this cause to the District Court is in conflict with this principle. The District Court for the Southern District of Texas, upon a review of the entire record, found that Respondent's claims in his petition for writ of habeas corpus were without merit and that no hearing should be held and that no certificate of probable cause should issue. This finding was not clearly erroneous within the rule prescribed by the foregoing cases. To the contrary, it is pointed out in the dissenting opinion by Chief Judge Hutcheson (Appendix "C", *infra*, pages 38, 39) that the decision of the District Court was amply supported by the facts contained in the record.

Conclusion

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILL WILSON
Attorney General of Texas

LINWARD SHIVERS
Assistant Attorney General

JOHN FLOWERS
Assistant Attorney General

JACK N. PRICE
Assistant Attorney General
Capitol Station
Austin 11, Texas

Attorneys for Petitioner

Affidavit of Service

Before me, the undersigned authority, this day personally appeared Jack N. Price, Assistant Attorney General, known to me to be the person whose name is subscribed to the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, who, having been duly sworn, did depose and on oath state that in accordance with Rule 33, U.S.C.A., a copy of this Petition for Writ of Certiorari has been served upon Edward Morgan MacKenna by depositing the same in the United States mails, with First Class Certified Postage prepaid, addressed to Edward Morgan MacKenna, Route 1, Box 1, Huntsville, Texas.

JACK N. PRICE
Assistant Attorney General

Subscribed and sworn to before me this ..... day of ....., 1959.

Notary Public in and for Travis County, Texas

Appendix "A"

Texas Code of Criminal Procedure, Article 543:

In the first application by the defendant for a continuance, it shall be necessary, if the same be on account of the absence of a witness, to state:

1. The name of the witness and his residence, if known, or that his residence is not known.

2. The diligence which has been used to procure his attendance; and it shall not be considered sufficient diligence to have caused to be issued, or to have applied for, a subpoena, in cases where the law authorized an attachment to issue.

3. The facts which are expected to be proved by the witness, and it must appear to the court that they are material.

4. That the witness is not absent by the procurement or consent of the defendant.

5. That the application is not made for delay.

6. That there is no reasonable expectation that attendance of the witness can be secured during the present term of court by a postponement of the trial to some future day of said term. The truth of the first, or any subsequent application, as well as the merit of the ground set forth therein and its sufficiency shall be addressed to the sound discretion of

the court called to pass upon the same, and shall not be granted as a matter of right. If an application for continuance be overruled, and the defendant convicted, if it appear upon the trial that the evidence of the witness or witnesses named in the application was of a material character, and that the facts set forth in said application were probably true, a new trial should be granted, and the cause continued or postponed to a future day of same term.

Appendix "B"

In The United States District Court
Southern District of Texas
Houston Division

EDWARD MORGAN MacKENNA,
Petitioner,

v.

O. B. ELLIS, DIRECTOR,
Texas Department of Corrections,
Respondent.

CIVIL ACTION
NO. 11297

Memorandum and Order:

This is a petition by Edward Morgan MacKenna, hereinafter called Petitioner, an inmate of the Texas State Penitentiary, in this District and Division, for the Writ of Habeas Corpus. Upon the presentation of such petition, an order was entered, calling upon the State of Texas or the Texas Department of

Corrections to file the record in Petitioner's case or cases. See order of December 3, 1957. The record has been filed and Petitioner has answered same, and the matter is now ready for determination.

After fully considering the record filed by the State and Petitioner's answer thereto, I believe such petition to be without merit, and decline either to grant the Writ of Habeas Corpus or enter an Order to Show Cause.

The clerk will record this Memorandum and Order on the minutes of the court and will furnish the Attorney General of Texas and Petitioner each a copy hereof. This Order is and constitutes a Final Judgment herein.

Done at Houston, Texas, this , January 28, 1958.

Joe Ingraham
United States District Judge

Appendix "C"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17213

EDWARD MORGAN MacKENNA,
Appellant,

versus

O. B. ELLIS, Director, Texas Department of Corrections,
Appellee.

Appeal from the United States District Court for the Southern District of Texas

---

(January 16, 1959.)

Before HUTCHESON, Chief Judge, and RIVES and WISDOM, Circuit Judges.

RIVES, Circuit Judge: This appeal is from a final Judgment declining either to grant the Writ of Habeas Corpus or to enter an order to show cause. The district judge, believing the appeal to be without merit, declined to allow it to proceed in forma

pauperis under Section 1913, Title 28 U.S.C.A., and also declined to issue a certificate of probable cause under Section 2253 of said Title. However, on April 4, 1958, a panel of this Court, consisting of Judges Rives, Tuttle, and Jones, granted a certificate of probable cause and the right to appeal in forma pauperis.

On December 5, 1955, an indictment was returned in the Criminal District Court of Dallas County, Texas, charging in substance:

> ". . . that one EDWARD MORGAN MACKENNA on or about the 18th day of October in the year of our Lord One Thousand Nine Hundred and 55, in the County and State aforesaid, did unlawfully and fraudulently take one camera, of the value of $225.00, and one case, of the value of $25.00, all of which is of the total value of $250.00 and the aggregate value of over fifty dollars, the same being the corporeal personal property of SQUIRE HASKINS from the possession of said SQUIRE HASKINS without the consent of the said SQUIRE HASKINS and with the intent to deprive the said SQUIRE HASKINS of the value thereof, and with the intent to appropriate it to the use and benefit of him, the said EDWARD MORGAN MACKENNA. Against the peace and dignity of the State."

On October 2, 1956, a jury in said Court returned its verdict finding the defendant guilty as charged in the indictment and assessing his punishment at

eight (8) years confinement in the penitentiary. Upon that verdict, judgment of conviction was entered on the same day. On November 1, said Court overruled the defendant's motion for new trial and then sentenced him to be confined in the penitentiary for not less than two (2) nor more than eight (8) years.

Acting pro se, the defendant prefected an appeal from the judgment of conviction. On April 3, 1957, the judgment was affirmed by the Court of Criminal Appeals of Texas in an opinion reported in 301 S.W. 2d. 657. On October 14, 1957, the Supreme Court of the United States denied the defendant's petition for certiorari, 355 U.S. 851, rehearing denied 355 U.S. 886. Meanwhile, on July 30 ,1957, the court of original jurisdiction had, without hearing, denied a petition for habeas corpus. On October 31, 1957, the Court of Criminal Appeals of Texas refused permission to file writ of habeas corpus, without written opinion. It appears that MacKenna has exhausted the remedies available in the Courts of the State of Texas as required by 28 U.S.C.A. §2254.

On December 3, 1957, he filed his petition for habeas corpus in the United States District Court for the Southern District of Texas. In contrast to most such petitions filed pro se, in forma pauperis, this one was extremenly well written and evidenced a considerable, though at times faulty and inaccurate, knowledge of law. The explanation probably lies in facts disclosed by the transcript of evidence taken upon MacKenna's criminal trial. There it

was proved that he is an educated man; two years at Tulane, and two years at Northwestern, graduating from Northwestern in 1934, and since then, working for a number of newspapers and becoming a feature writer for several periodicals. Also, on cross-examination, MacKenna admitted that he had a long record of no less than seven previous convictions for crime. Asked on re-direct examination whether he would care to explain to the jury the reason for the commission of those crimes, MacKenna answered:

> "Yes; alcohol. Overindulgence. Since 1953 I have been a member of A.A. I expected two of the members of A.A. to be up here today. Unfortunately, they are not here, not able to be here."

He has consistently denied his guilt of the theft of the camera and case. His testimony upon his criminal trial was substantially in accord with the more succinct statement in his petition for habeas corpus, viz.:

> "In October, 1955, petitioner inadvertently came into possession of an encased camera which, he determined subsequently to acquisition, had been apparently stolen prior to coming into his possession. The petitioner neither stole the camera, nor did he know it was stolen when acquired. The camera was left in petitioner's possession by an acquaintance, and upon discovery of the name and address of a Dallas commercial photographer on the bottom of the

case, petitioner realized he had stolen property on his hands.

"For more than 2 weeks petitioner attempted to find a way to return the camera to its rightful owner, without jeopardy to himself. For adequate reason—petitioner was on a Governor's pardon from the Texas Penitentiary at the time—petitioner could not return the camera in a normal manner open to one unencumbered by such a handicap.

"After days of searching thought petitioner finally decided to see the camera safely back in its owner's possession by placing it in a rental locker and mailing the key to the owner.

"Putting this plan into action, petitioner brought the camera and case into the Union Bus Terminal in Dallas on the morning of November 3, 1955, placing the case containing the camera in a rental locker, locked the locker, pocketed the key and stepped into an adjoining drug store to buy a special delivery stamp.

"Upon emerging from the drugstore petitioner was confronted and stopped by two Dallas policemen — Officer Pope, in civilian clothes and off-duty, and Officer Wise, uniformed man assigned to the bus terminal. Officer Pope, who knew petitioner by sight and name, told petitioner he was under arrest, searched him, removed the key from petitioner's pocket, opened the

> locker and took out the case. Officer Pope then opened the case, exposed the camera and told petitioner he would '. . . have to go downtown and explain it.'
>
> "Petitioner was taken to the City Jail and booked on a charge of theft of the camera."

The evidence to sustain his conviction consisted of his recent possession of stolen property.

Upon being presented with the petition for habeas corpus, the district court, citing *Baker v Ellis*, 5th Cir. 1952, 194 F. 2d 865, entered an order requiring the respondent to file a full and detailed answer within thirty days and giving the petitioner an opportunity to reply to that answer. After the filing of respondent's answer and petitioner's reply, and after considering the record thus made of the petition, answer, and reply, the district court declined to grant the writ or to enter a show cause order.

The grounds upon which appellant seeks habeas corpus are substantially four, two of which may be briefly disposed of as without mreit.

(1) Appellant claims that his conviction resulted from a conspiracy contrived by the prosecution. His sole ground for that claim is expressed in a "Note" to his petition as follows:

> "(Note: Petitioner feels it significant at this point to call to the attention of this Court the fact both counsel assigned by the

> trial Court, within 60 days of the trial of October 2, 1956, went to work in the office of the District Attorney of Dallas County as assistant district attorneys.)"

That, of course, is the averment of a mere suspicion and does not comply with Rule 9 (b), Federal Rules of Criminal Procedure, requiring the circumstances constituting any claimed fraud to be stated with particularity. Our full examination of the record discloses no substantial ground for suspicion of any such conspiracy, and we have no doubt as to the integrity either of the prosecuting attorney or of defense counsel.

(2) Appellant claims that he was illegally arrested and the key to the locker removed from his person by an illegal search, that the overruling of his objection to the finding of the camera and case in the locker forced him to testify in his own defense, and to be subjected to cross-examination disclosing his long pervious criminal record, and that thereafter his conviction was a foregone conclusion. The Texas Court of Criminal Appeals answered that contention as follows:

> ". . . Appelant, having admitted his possession of the camera and case was in no position to complain of the search and admission of the articles in evidence. Soble v. State, Tex. Cr. App., 218 S.W. 2d 195 and Salinas v. State, 159 Tex. Cr. R. 619, 266 S.W. 2d 388."

MacKenna v. State, 1957, 301 S.W. 2d. 657, 658.

If we assume that the arrest and search were illegal, we are nevertheless of the opinion that the admission in evidence in a State court of the fruits of an illegal search by State officers presents no substantial federal constitutional qusetion. *Wolf v. Colorado*, 1949, 338 U.S. 25.

The remaining two grounds which have more substance are: (3) that the trial court forced the appellant, over his objection, to accept representation of counsel appointed by the court; and (4) that he was given no reasonable opportunity to secure the presence and testimony of his witnesses.[1]

---

[1] Appellant alleges in his petition:

"Now, petitioner was committed to the Dallas County Jail on March 12, 1956, on the charge in the indictment supra. Three times during the following six months—once each in April, May, and June—petitioner's name appeared on the official court docket of the Criminal District Courts of Dallas County for appearance in court to answer said indictment. Each and every time the scheduled appearance was postponed at the request of the prosecution; no explanation was offered to petitioner, none could be obtained.

"Finally, after 6 months and 18 days in the Dallas County Jail, petitioner was slated once again for appearance in court—on September 28, 1956. On this date, for the first time, petitioner was taken from the jail to Criminal District Court No. 3.

"The sum and substance of this appearance was as follows: Judge McCormick ascended the bench, beckoned petitioner forward and asked if he had counsel to represent him. Petitioner replied affirmatively, stating that he was negotiating (sic) with a Dallas attorney, Mr. Ben Henderson, to handle the case. Without further ado, the Court informed petitioner it was appointing counsel to represent him.

(3) Upon his appeal from his judgment of conviction, MacKenna presented ten formal Bills of Exeption stated to be "drawn up in conformity with

---

"Petitioner raised immediate objection to the Court's action, protesting he had neither asked assignment of counsel, nor did he want counsel assigned. Judge McCormack ordered petitioner to be quiet and to sit down.

"Shortly thereafter, two young men came over to where petitioner sat in the courtroom, introduced themselves as Collier and Tucker and stated they had been appointed by the court to represent him. They also stated they were just out of the SMU Law School and that they had never before had a jury trial. As a matter of fact, they had handled only one prior case—a plea of guilty the week before.

"For about 15 minutes, petitioner and these two boys talked in the courtroom. The case at hand was touched on only superficially. Petitioner indicated in no way, either verbally or in writing, that he was willing to accept them as counsel. After the brief talk, petitioner was taken back to the County Jail.

"One court day later, on October 2, 1956, without the slightest word of warning, petitioner was summoned from the County Jail, taken back to Court and advised he was to be tried forthwith.

"Petitioner protested immediately there had been no advance notice whatsoever of the trial, so that the defense witness could be notified. Petitioner asked the assigned counsel to move for continuance, on the ground the defense witnesses were not present and had not been notified, and in reply, they advised petitioner they had already done so and that the Court had refused the motion. The trial had to be held, they added, because another trial originally scheduled for that date, that of a Latin American, had been postponed by the Court due to inability to find an interpreter and that petitioner's trial had been 'moved up.' Petitioner himself asked for continuance—the very first request made by petitioner in this case for continuance—but the Court refused the request and ordered the jury selected.

"And the trial was launched."

the provisions of Article 760 of the Code of Criminal Procedure of the State of Texas," upon which the court entered the following order:

> "The foregoing ten formal Bills of Exception were to me presented in writing by the defendant, Edward Morgan MacKenna, in person, on this the 25th day of January, A.D. 1957, and the same having been examined by me and having been by me submitted to counsel for the State, the same are found to be correct and are hereby allowed, approved, signed and ordered filed as part of the record in this case.
>
> "/s/ Joe B. Brown
> "Judge, Criminal District Court
> "No. 3, of Dallas County, Texas."

Exception I, so found to be correct and allowed and approved by the court, reads as follows:

"Exception I

> "Defendant was committed to the Dallas County Jail on March 12, 1956, on the indictment numbered above. In the ensuing 6 months, defendant's name appeared on the official court docket three times—once each in April, May and July—for appearance in Criminal District Court No. 3, to answer said indictment. Without apparent reason and without explanation, defendant was not taken to court on any of the noted occasions, or on any other occasion during the stated 6 month period.

> "On September 28, 1956, scheduled for appearance in Criminal District Court No. 3, once again, after 6 months and 17 days in the County Jail, defendant was taken to court for the first time.
>
> "The Court (Dwight L. McCormack, Judge,) asked defendant if he had counsel to represent him. Defendant replied he was negotiating with counsel of his own choice to handle the case. The Court then informed defendant that it was appointing counsel, and, over protest, proceeded to do so.
>
> "Then and there, in open Court, the defendant took exception to the action."

That exception tends strongly to sustain the ground which we have designated (3). For some reason, not apparent to us, the Texas Court of Criminal Appeals did not deal with that exception in its opinion (301 S.W. 2d 657). In his brief on this appeal, appellant urges:

> ". . . Appellant neither desired, nor asked, Judge McCormack to assign defense counsel; appellant would have rather defended himself. At least, had appellant defended himself, he would have been certain the defense witnesses were present for the trial!"

The defendant was entitled to a fair opportunity to secure counsel of his own choice.[2] Here, however,

---

[2] Powell v. Alabama, 1932, 287 U.S. 45, 70; 23 C.J.S., Criminal Law, §979, p. 318.

more than six months after his arrest and when there was no claim that he was prevented from communicating with counsel, he had reached only the negotiating stage. It was not error for the court to proceed without such counsel.[3]

The bill of exceptions states, however, that the court, over protest, proceeded to appoint counsel for the defendant. The defendant, being sui juris and mentally competent, had a right to rely on his own skill and ability and to conduct his defense in person without the assistance of counsel; and the court was not justified in imposing assigned counsel on the defendant against his will.[4] Clearly, we think, it would be a denial of due process of law for the court to refuse to permit the accused, sui juris and mentally competent, to defend himself and, instead, require him to accept the services of inexperienced and incompetent counsel, as is alleged in the petition for habeas corpus. The appellant is entitled to a hearing to ascertain the truth or falsity of such allegations. *Walker v. Johnston*, 1941, 312 U.S. 275, 286; *Waley v. Johnston*, 1942, 316 U.S. 101, 104.

---

[3] Neufield v. United States, D. C. Cir. 1941, 118 F.2d 375, 383; Harris v. United States, 5th Cir. 1957, 239 F.2d 612, 615; Moore v. United States, D.C. Cir. 1955 220 F.2d 198, 199.

[4] Adams v. United States ex rel. McCann, 1942, 317 U.S. 269, 279; United States v. Private Brands, 2nd Cir. 1957, 250 F.2d 554, 557; Simpson v. State, Tex. Crim. App. 1941, 148 S.W. 2d 852, 853; Compton v. State, Tex. Crim. App. 1912, 148 S. W. 580, 582; 23 C.J.S., Criminal Law, §979, p. 317; 14 Am.Jur. Criminal Law, §169; Annotation, 17 A.L.R. 266.

(4) Exception II, which the trial court also "found to be correct and . . . allowed (and) approved . .," was as follows:

"Exception II

"Two court days after appointment of counsel, above, defendant was taken back to court on October 2, 1956, and advised his trial had been 'moved up' because of postponement of another trial, and that he was to be tried forthwith.

"Defendant protested he had not had time to contact the witnesses who wished to appear in his defense, and asked for a continuance. Defendant has never theretofore asked for a continuance in the cause. The defense counsel appointed by the Court advised defendant they had moved for continuance, but that the Court had overruled the motion.

"Then and there, in open Court defendant expected."

The Texas Court of Criminal Appeals disposed of that exception as follows:

"While Bill of Exception No. II certifies that on the day the case proceeded to trial appellant 'protested he had not had time to contact the witnesses who wished to appear in his defense and asked for a continuance', the bill is insufficent as the application for continuance is not shown

therein. Pena v. State, Tex. Cr. App., 1 S.W. 2d 1095; Williams v. State, 115 Tex. Cr. R. 574, 27 S.W. 2d 217 and Chavez v. State, 147 Tex. Cr. R. 423, 181 S.W. 2d 85."

The appellee insists in brief (page 9) that, "Appellant was precluded from pleading the Court's failure to grant a Continuance in order to secure the presence of a witness, for the reason that none of the requirements of Article 543 (of the Texas Code of Criminal Procedure) were met . . ." That Article reads:

Art. 543. [608] [597] *First application by defendant*

"In the first application by the defendant for a continuance, it shall be necessary, if the same be on account of the absence of a witness, to state:

"1. The name of the witness and his residence, if known, or that his residence is not known.

"2. The diligence which has been used to procure his attendance; and it shall not be considered sufficient diligence to have caused to be issued, or to have applied for, a subpoena, in cases where the law authorized an attachment to issue.

"3. The facts which are expected to be proved by the witness, and it must appear to the court that they are material.

"4. That the witness is not absent by the procurement of consent of the defendant.

"5. That the application is not made for delay.

"6. That there is no reasonable expectation that attendance of the witness can be secured during the present term of court by a postponement of the trial to some future day of said term. The truth of the first, or any subsesuent application, as well as the merit of the ground set forth therein and its sufficiency shall be addressed to the sound discretion of the court called to pass upon the same, and shall not be granted as a matter of right. If an application for continuance be overruled, and the defendant is convicted, if it appear upon the trial that the evidence of the witness or witnesses named in the application was of a material character, and that the facts set forth in said application were probably true, a new trial should be granted, and the cause continued or postponed to a future day of the same term."

Such detailed and technical requirements of a motion for continuance, no doubt, serve a salutary purpose in a proper case, but they cannot justify putting a defendant to trial when he has been given no fair opportunity to secure the attendance of his witnesses. In any event, going outside the record and even contradicting the record are too flimsy

grounds to justify a denial to defendant of important constitutional rights.[1]

The record shows that MacKenna himself was the only witness who testified in his defense on the criminal trial. With his motion for new trial the defendant presented the affidavit of several witnesses, all but one of which affidavits were to the following effect:

> "THAT he would have testified in behalf of said defendant in the trial of the above issue, had there been sufficient advance notice of such trial for deponent to arranage his business matters so as to be able to appear and testify in behalf of said defendant.
>
> "THAT advancement of the trial date to October 2, 1956, on the morning of October 2, 1956, precluded deponent from appearing and testifying in behalf of said defendant, ...
>
> "That deponent believes such testimony he might have offered would have carried weight with the jury at said trial, and that the testimony would have affected the verdict of said jury.
>
> "That deponent will testify in behalf of said defendant, if said defendant is granted a new trial in the above-entitled issue."

---

[1] Palmer v. Ashe, 1951, 342 U.S. 134, 137; Johnson v. Zerbst, 1938, 304 U.S. 458 464, 468. See also dissenting opinion in Massey v. Moore, 1953, 205 F.2d 665 671, reversed 348 U.S. 105.

Madonna Orth Davenport's affidavit was to the following effect:

> "THAT on the 18th day of October, 1955, she was the legally-wedded wife of said defendant, having married said defendant theretofore, with said marriage being recorded in the Office of the County Clerk, Collin County, McKinney, Texas.
>
> "THAT deponent did, on each and every work-day, Monday through Friday, inclusive, during the month of October, 1955, drive to 2218 North Horwood Street, Dallas, where said defendant was employed at the Wholesale Printing Company, at times ranging from 5:00 to 5:30 PM, pick up said defendant and then drive said defendant home, at 5328 Rowena Street, Dallas, Texas, which they shared.
>
> "That deponent and said defendant did spend together each and every evening during the month of October, 1955, and this specifically includes the evening of October 18, 1955.
>
> "THAT deponent and said defendant, being together, did not go to the State Fair Grounds on the evening of October 18, 1955."

In his brief, appellant succinctly summarizes what what he claims would have been the testimony of

his witnesses, if he had been given an opportunity to produce them:

> "June Chapman, bookkeeper at the Wholesale Printing Company, 2218 North Harwood Street, Dallas, on the basis of appellant's time card of Tuesday, October 18, 1955, and on the payroll records of that company, could and would have testified that appellant was at work from 8:00 AM to 4:35 PM, on Tuesday, October 18, 1955, the date of the alleged theft.
>
> "Mr. Ward B. Chandler, Editor at the same company, could and would have offered vital testimony from the records and from his personal knowledge, corroborating (sic) the fact appellant was at work, during the time period noted above, on the date of the alleged theft, October 18, 1955. Further, Mr. Chandler could have (sic) would have offered favorable testimony as to appellant's character, work and social relationships. (R. 64, Appendix 'C', pp. 17-18.)
>
> "Madonna Orth MacKenna, (now Madonna Orth Davenport), 301 Wallace Drive, Garland, Texas, appellant's wife at the time, could and would have offered vital and material testimony showing that she picked appellant up at his place of employment, 2218 North Harwood Street, after work on the afternoon of October 18, 1955, as was her unfailing custom, that she drove him home. that she spent the remainder of the evening with him, and that

they specifically did not go (sic) to the State Fair grounds, the scene of the alleged theft, on the 18th of October, 1955. (R. 64, Appendix 'C', p. 19.)

"Dr. John F. Anderson, Jr., Pastor, First Presbyterian Church, Dallas, could and would have testified as to his calling on Fred Bruner, then Chief Assistant District Attorney of Dallas County, to demand and obtain a polygraph test for appellant. Further, he could and would have testified that he, Dr. Anderson, was subsequently notified by Mr. Bruner that appellant had successfully passed said lie detector test. Further, Dr. Anderson could and would have offered favorable testimony as to appellant's character, his home and church life. (R. 64, Appendix 'C', p. 16.)

"Major Kenneth E. Moss, Volunteer Parole Supervisor for the County of Dallas, Salvation Army and Mr. William Dalton, Parole Officer in and for the County of Dallas, could and would have offered vital and material testimony (sic) as to the existence and identity of the individual who left the stolen camera in appellant's possession. Further, they could and would have offered testimony as to appellant's character, his home life and of his adjustment in society. (R. 64, Appendix 'C', p. 18.)"

It is, of course, fundamental that there can be no due process without reasonable notice and a fair hearing. *Twining v. New Jersey*, 1908, 21 U.S. 78,

111; *Snyder v. Massachusetts*, 1934, 291 U.S. 97, 105; *In re Oliver*, 1948, 333 U.S. 257, 273. As Judge Biggs said for the Third Circuit in *Hague v. Committee for Industrial Organization*, 1939, 101 F. 2d 774, 782:

> ". . . He must have the opportunity to be heard and to call witnesses in his own defense. This is the very essence of due process of law as prescribed by the Fourteenth Amendment. Powell v. Alabama, 287 U.S. 45, 68, 53 S. Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527; Snyder v. Massachusetts, 291 U.S. 97, 122, 54 S. Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575; United States v. Ballard, D.C., 12 F. Supp. 321, 325."

Appellant is entitled to a judicial hearing to ascertain the truth of falsity of his allegations as to denial of due process in what we have designated ground (4), as well as ground (3). *Walker v. Johnston, supra; Waley v. Johnston, supra.*

The judgment is therefore reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

HUTCHESON, Chief Judge, Dissenting:

If this were a proceeding brought by one in custody under a judgment of a federal court to obtain

habeas corpus or Sec. 2255 relief and my differences with my colleagues arose out of whether, as a federal appellate court, they had taken a view of the merits of appellant's claims, with which I could not agree, I would not feel disturbed. I would content myself with simply stating in dissent that, as plainly appears from the statement of them in the opinion, the claims asserted are merely claims of error which under settled law in this circuit and elsewhere must be asserted by appeal, and that, as grounds for the extraordinary relief of habeas corpus, they are wholly insufficient, indeed are patently frivolous: This, however, is not such a case.

On the contrary, it is another of the growing number of cases in which federal appelate courts, asserting a kind of moral and legal superiority in respect to provisions made by state legsilatures regarding criminal trials and the proceedings in state courts in respect of such trials, which they do not have, seek to exercise a suzerainty and hegemony over them which under the Constitution, they do not now have, and, if we are to continue to hold to our federal system, they cannot in law and fact exercise. They do this by making habeas corpus proceedings brought by persons in custody *pursuant to a judgment of a state court*, serve the office of a second appeal. Only this time the appeal is to the federal courts to be considered and determined there by the exercise of a kind of supervisory and super appellate jurisdiction over state courts not governed by clear and settled

rules and standards but by the personal opinion of the particular reviewer, whether in a particular instance he thinks provisions of state laws governing criminal prosecutions, and proceedings had in state courts in respect thereto, do or do not measure up to what he thinks due process requires of the state under the vague, obscure and very fluid conception of due process thus stated in *Betts v. Brady*, 316 U.S. at 462:

> "Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may in one setting constitute a denial of fundamental fairness, shocking to the universal sense of justice, may in other circumstances and in the light of other considerations fall short of such denial." Cf. *Crooker v. California*, 357 US. at p. 441.

It is this statement and the flood of activist federal decisions asserting under it federal jurisdiction over state court judgments in criminal cases which is at the root of the feeling of state legislatures, state judges and state prosecutors, that federal judges are usurping authority and jurisdiction they do not have and makes them wonder and, wondering, ask on what meat have these, our federal judges, fed that they have grown so great. Cf. *Darr v. Burford*, 339 U.S. 200, at pages 210-11-12, and particularly the quotation in note 34 from statements by the late lamented Judge John J. Parker, made while serving as

Chairman of the Committee on Habeas Corpus[1] of the Judicial Conference of the United States:

> "... The thing in mind in the drafting of this section was to provide that review of state court action be had so far as possible only by the Supreme Court of the United States, whose review of such action has historical basis, and that review not be had by the lower federal courts, whose exercise of such power in unseemly and likely to breed dangerous conflicts of jurisdiction ..." Parker, "Limiting the Abuse of Habeas Corpus", 8 F.R.D., 171, 176-7.

With deference to the views of the majority in this case, it seems clear to me that the jurisdiction they have sought to exercise and the decision they have made upon the claims and facts in this case are not

---

[1] This committee, acting in concert with the Attorney General of the United States and with representatives of the Conference of Chief Justices of the States, of the Association of States Attorneys General, and of the Section of Judicial Administration of the American Bar Association, later submitted a proposed amendment to Sec. 2254, Title 28 U.S.C., developed by the committee with the approval of the representatives, as reported in the Proceedings of the 1954 meeting of the Judicial Conference, Sec. 22-24 at p. 22;

> "The committee found that many persons convicted by state courts are seeking release from state penal institutions by writs of habeas corpus in federal courts, claiming that constitutional rights had been denied them in the state courts, that although only an insignificant number of these petitions had been successful, they had imposed an unnecessary burden on the federal courts and greatly interfered with the procedure of the state courts."

in keeping with the views and principles set out above, but are repugnant thereto, as is also this criticism in the opinion of the requirements of Art. 543 of the Texas Code of Criminal Procedure:

> "Such detailed and technical requirements of a motion for continuance no doubt serve a salutary purpose in a proper case, but they cannot justify putting a defendant to trial when he has been given no fair opportunity to secure the attendance of his witnesses."

Preliminary to a precise consideration of the questions presented to and decided by the court, I point in opposition to the majority's statement, that the defendant persistently asserted his innocence, first to the fact that it appears from the record that the defendant took the stand on the trial of the case to testify on his own behalf and there admitted that he was a recidivist with a long criminal record of no less than seven previous convictions. I point, too, to the fact that when asked to explain his recent possession of the stolen camera, he made the patently false statement that, on October 13th, five days prior to October 18th, the day when, under the undisputed evidence, the camera disappeared from the car of its owner who had parked it near the State Fair Grounds in Dallas—he had been at the fair in the company of an

---

The committee's bill, therefore, provided among other things that "an order denying an application for a writ of habeas corpus by a person in custody pursuant to judgment of a state court shall be reviewable only on a writ of certiorari by the Supreme Court of the United States" (emphasis supplied)

unnamed penitentiary acquaintance of his who was carrying the camera; and that when this man departed he left the camera, and the defendant picked it up with the intenion of returning it to its owner. He further stated: that, after holding it for about two weeks, because of his bad record—he was out on a governor's pardon from a former conviction at the time—and his fear of going to the police, he decided to put it in a locker and to send anonymously to the owner, whose name was on the camera, the key thereto; and that, while making his journey to the locker, he had suffered injury therefrom.

The record also shows that appellant took and perfected an appeal from the judgment of conviction and applied for and was denied a writ of certiorari to the United States Supreme Court, and that, though he stated he was not represented by counsel, he did not complain either in the Court of Criminal Appeals or in the Supreme Court of the action of the court in providing him with the assistance of counsel and that he had suffered injury therefrom.

The district judge, carefully considering, in the light of the record, all his claims for relief, correctly, I think, denied them all as without merit and, as correctly, regarding them all as presenting no ground for the extraordinary relief of habeas corpus, denied a certificate of propable cause.

The majority, on the contrary, is of the opinion, incorrectly I think, that two of the claims put forward present grounds for such relief. One of these is that, though he appealed and his case was decided in the

Court of Criminal Appeals of Texas, 301 SW(2) 657, with certiorari denied by the United States Supreme Court, and, though he did not make any claim on appeal that he was prejudiced by the court's action in appointing counsel or the action of his counsel in conducting his case, the fact alone that the judge had appointed counsed to confer with and assist him was a denial of due process.

With deference, it seems entirely clear to me that this position of the majority that, without pointing to anything which his counsel did which interfered with or prevented him from doing what he wanted done, merely because of the fact that he said to the judge that he did not want counsel but wanted to conduct his own case, he can now assert that he was thereby deprived of due process, is patently untenable. However, assuming that, though he failed to assert it on appeal, he can now assert it on habeas corpus, no case has been cited, I have found none in which it has even been suggested, much less held, that a defendant is deprived of due process merely because the court, over his objection, appoints counsel to sit and confer with and assist him. Certainly none of the cases the majority cites in support of its view so hold. They all recognize that, while a defendant has a right to conduct his own case if the judge thinks him competent to do so, the judge has a wide and wise discretion in determining whether to appoint counsel to assist him, and not one of them has held, or even suggested, that the mere appointment of counsel, without a showing of harm therefrom, is a ground of error.

The second point, made by the majority, is no better taken. This is that the denial of his motion for continuance because of its failure to comply with the provisions of Art. 543 of the Texas Code of Criminal Procedure was a denial of due process. Here the majority, without pointing to any authority supporting the view, seems to think and say that the fourteenth amendment prevents or circumscribes the right of the Legislature of Texas to prescribe and of Texas courts to follow the prescribed procedure in criminal cases, and that it may be held that defendant has been deprived of due process when state procedure with regard to the requirements for motion for continuance does not conform to what the majority thinks due process requires.

Again, with deference but with complete conviction, I assert the law is absolutely settled otherwise. As pointed out in *Betts v. Brady*, 316 U.S. 455, and the many cases cited in it which have so held from and since its adoption, the Fourteenth Amendment does not require state courts to adopt criminal procedure prescribed for or in use in federal courts. See also *Gallegos v. Nebraska*, 342 U. S. 55.

One of the prime provisions of the Texas statute is that when a continuance is sought for lack of witnesses, "the facts which are expected to be proved by the witnesses must be shown and it must appear to the court that they are material."

The defendant did not make such a showing, he does not make such now. The affidavits of those he

puts forward are general and vague and state only that they could testify to matters which would aid defendant.

Under the facts of this case, to send it back to the district judge to try the issues presented is, I think, a complete rejection of the basic principle that a state, in matters in its own sphere, is sovereign, and that it is not subject to the supervision and control of federal courts.

I think the judgment should be affirmed, and I respectfully dissent from its reversal.

A true Copy Test:

EWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit

By CLARA R. JAMES
Deputy
New Orleans, Louisiana

Appendix "D"

Johnny Moore, Appellant
No. 30,636, v. —Appeal from Potter County
The State of Texas, Appellee

Opinion

This is a conviction for burglary, with punishment assessed at two years in the penitentiary.

The record in this case affirmatively reflects that this appellant, an eighteen-year-old boy, was not represented by counsel either of his own choosing or by appointment by the court. There is an absence of any suggestion in this case that the trial court tendered or offered to appoint counsel for appellant, or that appellant was financially able to employ counsel. There is an absence of any evidence that appellant possessed sufficient education or was mentally alert to the point of being able to represent himself upon the trial of this case.

The rule requiring representation by counsel in the trial of an ordinary felony case in a state court appears to have had its beginning over seventeen years ago in the case of Betts v. Brady, 316 U.S. 455. The latest expression from that court attesting the rule is found in Cash v. Culver, decided February 24, 1959, advance publication. The cases touching the question since Betts v. Brady, supra, will be found listed in a footnote in Cash v. Culver, supra. We will not here set them out.

In Parsons v State, Tex. Cr. R. , 218 S.W. 2d 202, this court recognized the rule stated, and

followed and applied the rule in Johnson v. State, 157 Tex. Cr. R. 564, 251 S.W. 2d 739, by reversing the conviction because the accused was not represented by counsel.

It appears, therefore, that it is now the settled law of this state that the facts and circumstances of each case will determine whether due process is violated by failure to appoint counsel for one on trial for an ordinary felony in a state court.

Among the various factors entering into a determination of the question is that which is referred to as "the complexity of the proceedings." Cash v. Culver, supra. See, also, Rice v. Olson, 324 U. S. 786, and Gibbs v. Burke, 337 U. S. 773.

The "complexity of the proceedings" is patently applicable in the instant case, for therein is a serious question as to the sufficiency of the evidence to support the conviction, which can be justified only by the use of the written confession of the appellant.

The complexity of the proceedings is further demonstrated in the fact that the state used in evidence the written confession of James Otis Williams after he had repudiated it and denied that portion thereof which inculpated appellant in the crime.

The witness Williams was an accomplice, and under the laws of this state the trial court was under the burden of requiring corroboration of his testimony.

The trial court appears to have entertained some question relative to the admission in evidence of the written confession of the accomplice Williams which was inculpatory of the appellant, for the charge reads that his confession was expressly limited to the jury's consideration

> "for the sole and only purpose of bearing upon, if it does, the question of whether or not the statement of the defendant in writing, State's Exhibit No. 2, was freely and voluntarily given; and you shall not consider it for any purpose as bearing upon, if it does, the question of guilt or innocence of the defendant, or as any circumstance to show or tend to show his connection, if any, of the offense charged herein."

So, in effect, the trial court told the jury that Williams's confession could be utilized for the purpose of determining the voluntariness of appellant's confession.

A more complex situation could hardly arise in the trial of a criminal case, for the hearsay rule was violated in the admission of the confession of the state's witness Williams, who repudiated the truth of the confession.

In addition, the jury were limited to a consideration of Williams's confession for a purpose which could not have any probative value—that is, to determine whether appellant voluntarily made the confession which the state used against him.

To all those proceedings no objection was urged by the appellant.

Giving effect to the decisions of the Supreme Court of the United States and the rule of law announced therein, we are constrained to agree that under the facts here presented this conviction must be reversed, because of the failure on the part of the trial court to appoint counsel for the appellant.

While we have no statute in this state which requires the appointment of counsel for one on trial for an ordinary felony, the Supreme Court of the United States in a series of decisions has judicially determined and held that failure to appoint counsel for one on trial in a state court for an ordinary felony may constitute a denial of due process, under the Fourteenth Amendment to the Constitution of the United States.

Attention is also directed to the fact that under the statute law of this state counsel should have been appointed to represent this appellant.

This being a burglary case, the provisions of the suspended-sentence law were applicable. Art. 776, C. C. P. Under that statute it is the mandatory duty of a trial court in such cases "When the defendant has no counsel . . . ." to "inform the defendant of his right to make such application (for suspended sentence), and the court shall appoint counsel to prepare and present same if desired by defendant."

Failure to comply with that mandate constitutes reversible error. Crowell v. State, 161 Tex. Cr. R. 584, 279 S.W. 2d 882; Diaz v. State, 159 Tex. Cr. R. 545, 266 S. W. 2d 136; Arsola v. State, 138 Tex. Cr. R. 1, 133 S.W. 2d 585; and Noble v. State, 112 Tex. Cr. R. 541, 17 S. W. 2d 1063.

While it is true that when appellant was advised of his right to make application for suspended sentence he declined to do so, such advice from the court was not sufficient, because the statute requires that counsel be appointed "to prepare and present the same if desired by defendant."

Noble v. State, supra, is direct authority supporting the proposition that the statement of the trial court was not a sufficient compliance with the statute and that nothing short of appointment of counsel will satisfy the statutory requirements. In that case the trial court " 'took special pains to advise the defendant of his right to file an application for suspended sentence'," which is exactly what the trial court did in the instant case.

In the Noble case, however, the trial court went further and " 'instructed the Clerk to prepare the application for the defendant to sign' " and in addition thereto the district attorney interrogated appellant as to whether he was eligible for a suspended sentence. There appeared to be no legal impediment to the granting of a suspended sentence in that case.

No legal impediment is shown to have existed in this case to the granting of a suspended sentence.

The Noble case was reversed for the failure to appoint counsel, so that case is direct authority requiring a reversal of the instant case.

For the reasons stated, the judgment is reversed and the cause is remanded.

Davidson, Judge

(Delivered May 13, 1959)

Johnny Moore, Appellant
No. 30,636 v. —Appeal from Potter County
The State of Texas, Appellee

Concurring Opinion

Since the Supreme Court of the United States allowed a collateral attack after final conviction by writ of habeas corpus in Cash v. Culver, supra, I entertain no doubt that they would reverse an affirmance of this appellant's conviction upon appeal.

Without an attorney to assist in his defense, the jury could not be expected to properly understand and apply that portion of the court's charge quoted in my brother Davidson's opinion.

I agree that this judgment should be reversed.

Morrison, Presiding Judge

(Delivered May 13, 1959)

Johnny Moore, Appellant
No. 30,636 v. —Appeal from Potter County
The State of Texas, Appellee

Dissenting Opinion

The offense is burglary. The State proved the burglary in which property of the value of more than $50 was stolen. Appellant signed a confession, which was admitted in evidence, in which he implicated himself in the burglary and admitted his part in the breaking and entry. This, under many authorities, was sufficient to sustain his conviction.

In addition, a bill fold or wallet which had been loaned to appellant two or three weeks before was found outside the broken back door.

The record shows that appellant did not desire to apply for suspended sentence. The jury assessed the minimum punishment.

The "complexity of the proceedings" arose through appellant's successful effort to raise an issue as to the voluntary character of his confession by questions alone, without subjecting himself to cross-examination or to the pains and penalty of perjury. All of the testimony was to the effect that the confession was voluntarily made in accordance with the statute. The questions indicated the contrary. I do not understand that this ordinary burglary case thus became a "Complex proceeding" as that term is used in the authorities cited.

I am in full sympathy with the effort of the majority to uphold the principle of law that an accused's constitutional right to have the benefit of counsel is a valuable right which the courts will strictly enforce. Art. 1, Sec. 10, Constitution of Texas and Constitution of the United States, Sixth Amendment, guarantee such right.

Also I join in the belief that, though not required to do so in noncapital felonies, counsel should be appointed to represent every defendant who has used diligence to secure counsel and, being unable to do so, requests the court to appoint an attorney to represent him.

Appellant is represented by counsel who filed motion for new trial, perfected the appeal and filed brief in appellant's behalf in this Court. There is nothing in this record to show that appellant used any diligence to secure counsel of his own selection earlier; nothing to show that he desired that the court appoint counsel for him, and there is no complaint raised by appellant or his experienced counsel on appeal that he has been denied counsel.

The effect of the majority opinion is that, contrary to its prior decisions, this Court announces the rule to be that in all felony cases wherein the defendant is not represented by counsel his conviction will be set aside unless the record affirmatively shows that the defendant was financially able to employ counsel, and that he possessed sufficient

education and mental alertness to the point of being able to represent himself upon the trial.

Such holding is directly contrary to the presumption on appeal that the trial court's rulings and acts are correct and fair. It overlooks the fact that an accused has the constitutional right to be heard by himself; that he may waive representation by an attorney; that the accused must use diligence to secure counsel; and that even in capital cases the duty of the court to appoint counsel arises only when the court is apprised of the fact that the accused is too poor to employ counsel.

Appellant was advised of his rights with reference to application for suspended sentence and stated "I don't want to ask for suspended sentence."

The statutes of this State do not require that counsel be appointed to represent a defendant in a non-capital felony who states that he does not desire to file application for susupended sentence. The majority opinion overlooks the limitation in Art. 776 C. C. P. "if desired by defendant." It also overlooks the holdings of this Court that the attorney appointed pursuant to the requirements of Art. 776 C. C. P. is not under the duty to defend generally, but only to prepare and present the plea for suspension of sentence.

Any claim (and there is none) that appellant was too poor to employ counsel would be refuted by the fact that he did obtain counsel who filed his motion

for new trial, perfected his appeal and filed brief in his behalf in this Court.

It is deemed appropriate, also to direct attention to the fact that the reversal of the conviction is not founded upon the legal conclusion of a majority of the members of this Court that appellant has been denied his constitutional right to be represented by counsel, but upon the belief that an affirmance would be reversed by the Supreme Court of the United States upon appeal.

If this be the true function of judges, the law is indeed uncertain.

Whether by this Court or by the Supreme Court, a reversal of this conviction on a constitutional question, upon the record before us, would be without any pleading or proof to sustain the holding. The case cited would not support such a reversal.

I respectfully dissent.

Woodley, Judge.

(Delivered May 13, 1959)